Subject: [Fwd: Request for Reconsideration]
From: Dan Bockhorst <dan_bockhorst@commerce.state.ak.us>
Date: Tue, 22 Feb 2005 07:59:45 -0900
To: Lorna J Mcpherren <jeanne_mcpherren@commerce.state.ak.us>

-------- Original Message --------
Subject: Request for Reconsideration
Date: Sat, 19 Feb 2005 15:41:20 -0800
From: Abigail Fuller <full7960@uidaho.edu>
To: Dan Bockhorst <dan_bockhorst@commerce.state.ak.us>

Attached please find a request for reconsideration of the decision on remand of Homer's annexation. This request is from myself as respondent and also from CCAA. We are sending one combined request in order to not create more work for the Commission than necessary. A hard copy and signed affidavit will be mailed as soon as the Post Office is open again, they are closed on Monday. I will fax the affidavit shortly.

Abigail Fuller

REQUEST FOR RECON.doc

REQUEST FOR RECONSIDERATION OF THE LOCAL BOUNDARY COMMISSION'S DECISION UPON REMAND OF THE CITY OF HOMER ANNEXATION

CCAA and Abigail Fuller jointly request reconsideration of the Commission's decision of 2/4/2005 on the Homer Remand, for the reasons that follow. CCAA identifies Abigail Fuller as its representative for this request. We file this request to give the Commission a chance to correct several serious errors with its decision prior to an appeal.

The Commission's vote was based on constructive misrepresentation, because it misapplied Vic Fischer's testimony.

We presume that all statements in the Written Decision were relied on by the LBC when voting. Some of these statements are false, but our main concern is with Vic Fischer's testimony.

Mr. Fischer claimed that the state constitution sets cities above service areas, when it does not. He was really talking about both a desire to replace special districts with municipalities, and a limit on the creation of service areas. Mr. Fischer's testimony was a misrepresentation as applied to the issue before the Commission. His testimony tended to both confuse service areas and special districts as if they were one and the same, and to separate service areas from the borough of which they are a part. There is nothing in the state constitution or the minutes of the convention that suggests an intent for urban areas to have city governments; this is Mr. Fischer's personal opinion and should not be taken as gospel by the Commission.

The state constitution intended to do away with special districts in favor of municipal governments, specifically boroughs. Alaska Const. art. X, § 15. The concern was that there would be too many separate taxing districts, but borough service areas are not separate taxing districts. The state constitution created borough service areas as a way for boroughs to provide localized services. They are a *part* of a municipal government, not a lesser entity that a city can claim a preference over. Any question of preference in this case is between cities and boroughs. The state constitution intended cities to be a part of the borough, suggesting a preference for boroughs over cities not vice versa. Alaska Const. art. X, § 7. To the extent that the Commission relied on Mr. Fisher's statements about special districts because of a belief the statements were about service areas, the Commission has relied on a misrepresentation. This aspect of the decision should be reconsidered.

Mr. Fischer also pointed out the clause in the state constitution that limits the creation of service areas if the services can be provided by a city, borough, or other service area. Alaska Const. art. X, § 5. This is a limitation on the creation of service areas, to prevent proliferation of multiple small districts. It is not a blanket preference for cities over service areas, nor is it meant to restrict the formation of necessary service areas. Not even the city has tried to claim that KESA was not necessary; their own planning group had found a need several years earlier. R. 993-1017. Claiming that this limitation clause creates a preference for cities over service areas is a misrepresentation, which the Commission relied upon. We ask the Commission to reconsider.

The Commission has Failed to Follow Two Controlling Principles of Law: the Doctrine of the Law of the Case, and the Doctrine of Prospective Action.

The Commission failed to follow the principle of law known as the "law of the case." Under the doctrine of law of the case, the Commission cannot alter the Superior Court's decision. The doctrine states that a lower court must follow the ruling of an appellate court, as to any issue that has been ruled on by the appellate court. *ACS of Alaska, Inc. v. Regulatory Comm'n*, 81 P.3d 292, 298 (Alaska 2003). In this case, the Commission is in the place of the lower court, and the Superior Court is the appellate court. Until Judge Rindner's decision has been appealed to a higher court, it is the law for this proceeding.

The law of the case relevant to this remand is that: (1) the creation of KESA is irrelevant, (2) the Commission, in its prior decision making, did not adequately consider the impact of annexation on KESA, and (3) this consideration falls under existing standards related to the best interests of the state. Order on Appeal 19-22, (Dec. 4, 2003).

1. <u>The Creation of KESA is Irrelevant.</u>

The Commission's position in part A of its Findings and Conclusions ignores the Superior Court's opinion that the *creation* of KESA was irrelevant, because it is an established service area whose creation was not challenged. To continue to harp on an alleged preference for annexation over *creation* of service areas is beating a dead horse. The law of the case is that the creation of KESA is accepted and is not relevant to the issue of annexation's impact on KESA. The Commission is trying to reargue a settled point instead of doing that which it was ordered to do. It should reconsider its position.

2. <u>The Commission did not Adequately Consider the Impact of Annexation on KESA.</u>

The Commission tries to claim, in part A of its decision, that it does not need to address annexation's impact on KESA any further because it already did so. But, the Superior Court explicitly stated that the prior mention of KESA was insufficient. The Court's finding of insufficiency is the law of the case. Until the deficiency is corrected, the Commission has not made a valid finding that the relevant standards are met. The Commission should reconsider making an official finding that is directly contrary to the controlling law of this case.

The Commission must comply with the Superior Court's order to discuss the impact of annexation on KESA and then to reconsider whether annexation is in the State's Best Interest. It has not done so. Obeying court orders is the very foundation of our entire legal system, yet the Commission thinks it can get out of doing so by merely going through the motions. The Commission has not discussed the impact of annexation on KESA, instead it has merely rubber stamped the staff's conclusion that KESA is still viable based solely on a comparison of KESA with other service areas. Viability is not the same as impact.

The Court wanted the Commission to assess annexation's impact on KESA and then reweigh the balanced best interests and the state's best interest. Comparing apples to

oranges and then finding mere viability from that comparison is not what the Court had in mind. Saying that the impact is "de minimus" based on an assumption of viability is not enough. A service area may still be viable while only able to provide half the services it would have otherwise. Providing only half the services might not be in the states best interest, if the benefits to the city of annexation don't outweigh the loss to the service area. The Commission has completely failed to consider what the impact of the loss of tax revenue means to KESA in terms of providing services. For example, there is no discussion of the data provided by respondents concerning the impact on KESA. Until the Commission actually discusses and considers the impact of annexation on KESA it has not complied with the Court's order and has not made a valid finding that the best interests standards have been met.

The Commission pretends to have this discussion by arguing over the definition of the term "cherry picking." Disputing the technicality of whether or not Homer "cherry picked" KESA is not the same as considering the impact of annexation on KESA. Regardless of what it is called, the effect was the same. The *impact* of annexation was to remove a small area with a high tax value from KESA, but instead of analyzing what this meant to KESA and the state's interests, the Commission disputed the term "cherry picking." The Commission admits that annexation removed the high-value portion of KESA's tax base but merely nit-picks over whether the term "cherry picking" can be applied to this fact, instead of determining its impact on KESA. The Commission is throwing up a smokescreen instead of complying with the court's order.

What the Commission was supposed to do was to determine the effect on KESA of the revenue loss, and weigh that harmful effect against the previously determined benefits of annexation.[1] Those benefits accrue only to the city and the territory annexed, *not* to the area beyond. The Commission's constitutional mandate is to consider the *overall* pros and cons to the greater area, not just follow the parochial viewpoint of the city. It still has not done so. It dimisses any impact to KESA by claiming it is de minimus without explaining how it came to that conclusion. The only discussion involves a comparison of KESA to other service areas in the borough, without any allowance for the varying needs and kinds of service of the different areas, to find that KESA is still viable. The annexation opponents have never claimed that KESA was not viable, only that the LBC has refused to take into consideration the harm annexation does to KESA when weighing the balanced best interests of all entities and the best interests of the state. Because KESA is a borough service area, harm to KESA is harm to the borough, a fact the Commission refuses to recognize simply because it is biased against service areas.

Until the Commission actually assesses the harm to KESA, it has not complied with the Court's order. In order to assess the harm the Commission needs to actually take into account the information provided to the Commission during the remand proceedings, especially the written comments provided by CCAA. It appears that all of this information about the harm to KESA was ignored; it certainly isn't addressed in the

[1] We do not concede that annexation actually benefits the annexed territory, rather we are following the law of the case. Judge Rindner accepted the Commission's finding of benefit and we will save any dispute of that finding for the appropriate forum.

Written Decision. Until the Commission actually considers the harm to KESA as part of its decision, two standards have not been met: 3 AAC 110.140[2] and AS 29.06.040(a).

3. Consideration of the Impact of Annexation on KESA is Part of the Best Interests Standards.

The Commission has also ignored the law of the case as it applies to part B of its decision. Instead of following Judge Rindner's ruling that it had failed to consider a important factor under the Best Interests of the State standard, the Commission claims that the Court unconstitutionally created a new standard. However, because Judge Rindner's decision has not yet been appealed, it is the law of the case. The law of the case is that annexation's impact on KESA falls under existing standards. The Superior Court has ordered the Commission to consider annexation's impact on KESA and the Commission can only dispute the Court's power to so order by appealing to the Supreme Court. That appeal has not been filed and so the Court's order stands as law for this remand.

In addition to ignoring the law of the case doctrine, the Commission has also chosen to misconstrue the statute that controls the Best Interests of the State standard, by quoting it selectively. It is not discretionary as the Commission tries to claim, but mandatory. The Commission cites the portion that says the Commission "may" approve a petition that is in the state's best interest, but neglects to mention the subsequent sentence that says that if the petition is not in the state's best interest it *must* by disapproved. AS 29.06.040(a).[3] Therefore, the Commission must make a best interests determination, and if the annexation is not in the best interests of the state it must be disapproved. The Commission has discretion *only* if the annexation is found to meet the best interests of the state, not when it does not.

Nor was the Superior Court putting its judgment "ahead of that of the Commission on interpretation on a particular policy issue." Statement of Decision 25 (Feb. 4, 2005) (citing Vic Fischer). The Court was interpreting a statute, AS 29.06.040(a), which is its job. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.") The Commission may not agree with the Court but the Court has the final say, for now. The Commission may appeal, but until it does so successfully, the Court's interpretation of the statute is the law and the Commission must abide by it on remand. The Commission should reconsider its position in part B of its decision.

The Commission has Ignored that New Regulations have a Prospective Action Only, and that an Agency Must Follow its own Rules.

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[2] As in effect on Dec. 15, 2001.

[3] The full section applicable here is: " If the commission determines that the proposed change, as amended or conditioned if appropriate, meets applicable standards under the state constitution and commission regulations and is in the best interests of the state, it may accept the proposed change. Otherwise it shall reject the proposed change." Note the last sentance, which the Commission fails to quote when it refers to this statute.

The Commission has also ignored the controlling principle of law that new regulations have a prospective action only. AS 44.62.240. The Preliminary and Final Reports rely on regulations that were not approved until May of 2002, when the regulations that apply to this remand are the ones that were in effect when the Commission made its original decision, in December of 2001. The earlier versions are the rules that control on remand, because the remand is a reconsideration of the earlier decision. The new regulations, effective May 2002, cannot be retroactively applied to Homer's annexation. This error was pointed out to the DCCED but went uncorrected. CCAA Comments 1, and Fuller Comments 1. Instead of correcting this misrepresentation of the rules, the DCCED tried to claim it was trying to avoid confusion! There is nothing more confusing than citing the wrong rules. The Commission has based its vote on the wrong set of standard. The correct ones can be found as footnotes in the original Written Decision, or in the Record on Appeal at R. 105-108 and R. 137-139.

In addition, the Commission failed to follow its own rules when it applied the new regulations instead of the ones that were in effect for the original decision. In it's Order Relating to Procedures (May 18, 2004) (when it set the rules for this proceeding) the Commission explicitly set a cut-off date of Jan. 17, 2002. The Commission was very clear that it would not accept any material or testimony related to events after that date. To then apply regulations that were not in effect until after that date is a violation of the Commission's own rules. It is a long standing principle of law that an agency must follow its own rules.

Of course, the Commission will find itself in a bit of a bind when it tries to apply the regulations that were in effect in December of 2001, because there was no regulation to implement the requirements of AS 29.06.040(a). According to the Commission's staff, without a regulation it cannot make a decision. Preliminary Report on Remand 72-73. The Commission quotes the *Nome* case for it's argument concerning the alleged new standard, although it glosses over the need for implementing regulations. Written Decision on Remand 20 (Feb. 4, 2005). Without a regulation defining the standard, a decision of the Commission is not valid. In other words, the original decision was invalid from the start, and any remand decision, being under the same rules, is also invalid. The only finding the Commission can make is to disapprove Homer's annexation, any other decision will be invalid under the doctrine established in *Nome*.

Conclusion.

Because the Commission has ignored the Court's order and several basic principles of law, and relied on misrepresentation, we ask it to reconsider its decision on Homer's remand.

AFFIDAVIT

I hereby certify that to the best of my knowledge, information, and belief, formed after reasonable inquiry, this request for reconsideration is founded in fact, and is not submitted to harass or to cause unnecessary delay or needless expense in the cost of this remand proceeding, and that a copy of this request for reconsideration and this affidavit have been served on the City of Homer's council via regular mail.

_____

Abigail Fuller, representative for CCAA.

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Abigail Fuller, representative for CCAA.

2/19/05

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